Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-263

CHARLES GALBREATH,
Petitioner,

vs.

NEWSPAPER PRINTING CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Tennessee

CHARLES GALBREATH
201 Second Avenue, North
Nashville, Tennessee 37201
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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OPINIONS BELOW

The dismissal of Petitioner's class action (Appendix A) by the Chancery Court of Davidson County, Tennessee was reversed and remanded by the Court of Appeals by opinion of October 28, 1977 (Appendix B) reversed by the Tennessee Supreme Court on the 7th day of May, 1979 in a decision reported at 580 SW2d 777 (Tenn. 1979). (Appendix C)

QUESTIONS PRESENTED

1. May a combination of newspapers claiming the protection of the Newspaper Preservation Act, 15 U.S.C. 1801, et seq., so as to enjoy an exemption from the general provisions of the Sherman Anti-Trust Act, 15 U.S.C. 1, et seq., and thereby exercise a monopoly in their trade area, refuse to accept commercial advertisements containing abbreviations of words in the text designed to reduce the cost of its publication without a rational reason for rejection, thereby effectively depriving the advertiser access to the press?

2. Under the circumstances of this case, was the question of whether or not the conduct of the Defendants was permitted under the Newspaper Preservation Act, supra, properly determined upon motion for summary judgment, without any evidentiary hearing in the trial court?

STATUTORY PROVISIONS INVOLVED

The United States statutes involved in this case are 15 U.S.C. § 1, 2, et seq., and 15 U.S.C. § 1803(c), which are set out in Appendix D.

STATEMENT OF THE CASE

The Plaintiff sought to place a rental advertisement in the Nashville *Tennessean* and Nashville *Banner* through its jointly owned agent, Newspaper Printing Corporation. In composing the advertisement he used abbreviations to reduce the lineal space needed to convey the message as an economic device calculated to reduce the cost some twenty-five (25%) percent. The ad was rejected as composed:

> West End Area—Lge. apt. 4 rms. 1 b.r., Cent. heat and a/c Drps. Shag cpts. frost free ref. gar dis. ds. washer. $145 —352-4066.

and the Defendant refused to publish the ad until it was revised so as to read:

> West End Area—Large apartment. 4 rooms. 1 bedroom. Central heat and air conditioning. Drapes. Shag carpet, frost free refrigerator Garbage disposal. Dishwasher. $145. 352-4066.

Plaintiff's original Complaint in the Chancery Court of Davidson County, Tennessee, alleged, and it was admitted, that the policy of the Defendants was to refuse advertisements using such abbreviations, it being the contention of the Defendant Newspaper Printing Corporation that such use would confuse the readers of the newspapers while it was the contention of the Complainant that the practice was insisted upon only to increase the cost of advertisements by members of the public and that the policy was not rational inasmuch as every other newspaper in the United States that accepts commercial advertisements permit the free use of abbreviations in the text of the paid advertisements carried.

The Chancellor granted a summary judgment to the Defendants and the Court of Appeals of Tennessee reversed and remanded them to the trial court for consideration of damages. The Supreme Court of Tennessee reversed the Court of Appeals and held that "Newspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication." The opinion further held that the practice challenged as an inflationary cost raising scheme did not violate proscription contained in the Newspaper Preservation Act (15 U.S.C. § 1803(3)) provision that:

> Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

The stage of the proceedings in which the federal questions sought to be reviewed was in the memorandum opinion of the trial court, attached hereto as Appendix A.

REASON FOR GRANTING THE WRIT

The Supreme Court of Tennessee has decided a federal question of substantial importance not theretofore determined by this Court, and in doing so has misinterpreted and misconstrued 15 U.S.C. § 1803(3).

JURISDICTION

The order of the Supreme Court of Tennessee which Petitioner seeks to review was entered on May 7, 1979 (Appendix C). No petition to rehear or further proceedings have been had below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

ARGUMENT

Commercial free expression, as embodied in media advertisement, is essential to the preservation of our culture.

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. See *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 904, 906, 92 S.Ct. 204, 208-209, 30 L.Ed.2d 175, 177-178 (1971) (Douglas, J., dissenting from denial of certiorari). See also *FTC v. Proctor & Gamble Co.*, 386 U.S. 586, 603-604, 87 S.Ct. 1224, 1242-1243, 18 L.Ed.2d 303, 324-325 (1967) (Harlan, J., concurring). And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal.
>
> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, — U.S. —, 96 S.Ct. 1817 (1976).

If, as the Supreme Court of Tennessee states in its opinion in this case, "The publication of a newspaper is strictly the private business of its publisher" and "publishers may refuse to publish whatever advertisements they do not desire to publish even though the newspaper . . . may enjoy a . . . monopoly", the power to control and destroy businesses, political candidates, and causes thereby vested in newspapers such as the *Tennessean* and *Banner* working through its publishing agent, the Newspaper Printing Corporation as a monopoly is insurmountable. A local Macy's type department store, favored by the newspapers and allowed to advertise could soon bankrupt its rival Gimble's type operation who could not compete without advertising. A favored political party could hardly fail to win all elections if the only available news outlet closed not only its front and editorial pages to its opposition, as undoubtedly it would have the right to do, but arbitrarily rejected paid political advertisements of the same type it sold to others.*

Petitioner respectfully urges that the foregoing considerations logically require the recognition of his standing to assert the rights and protections secured to him by the First Amendment to the Federal Constitution and the anti-monopoly restrictions of the Newspaper Preservation Act. 15 U.S.C. § 1801, et seq., under the circumstances of the present case.

CONCLUSION

Wherefore, it is respectfully prayed that this petition for the Writ of Certiorari to the Supreme Court of Tennessee be granted.

CHARLES GALBREATH, pro se
201 Second Avenue, North
Nashville, Tennessee 37201
Attorney for Petitioner

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* For many years, under the stewardship of its publisher, the late Silliman Evans, Sr., *The Tennessean*, then styled *The Nashville Tennessean*, carried as a part of its masthead the following motto: *"The news columns shall be fair and accurate, the editioral columns shall be honest and just in the expression of conscientious opinion."* No reference was made to the advertising columns. Under Mr. Evans' successors, the publication of the motto has been discontinued.

Certificate of Service

I hereby certify that three (3) true and exact copies of the foregoing have been sent by U.S. Mail, postage prepaid, to the Hon. Alfred H. Knight, III, attorney for the respondent, this 16th day of August, 1979.

Charles Galbreath

APPENDIX

APPENDIX A

Charles Galbreath vs. No. A-8213-II Newspaper Printing Corp., et al.	In the Chancery Court of Davidson County, Tennessee, Part III.

MEMORANDUM

This cause is before the Court upon the motions of the plaintiff and defendants for summary judgment, Rule 56, TRCP. The plaintiff seeks injunctive relief and damages as a result of what he alleges is unlawful conduct on the part of the defendants. The suit involves the refusal of Nashville's daily newspapers to accept an advertisement plaintiff desired to publish.

I

The Plaintiff's Cause of Action

The plaintiff operates a business known as Galbreath Rental Company, a sole proprietorship which owns and leases residential real property. The defendants Tennessean Newspapers, Inc. and Nashville Banner Publishing Company are Tennessee corporations which publish daily newspapers, the *Tennessean* and the *Nashville Banner*, respectively. The defendant Newspaper Printing Corporation (NPC) is a corporation owned by the two newspapers and acts as their agent for advertising.

The complaint alleges that on December 15, 1975, and on many occasions prior thereto, the plaintiff composed and submitted an advertisement for publication in the classified ad sections of the two newspapers. The advertisement he submitted is fully set out in the complaint and contains abbreviations for words which describe the features of the rental property. The

defendants refused to accep. his advertisement containing the abbreviations and required him to compose and submit an advertisement without the abbreviations. This resulted in the use of one-third (⅓) more space and a resulting increase in cost to the plaintiff.

The plaintiff seeks damages and temporary injunctive relief. The complaint also asks that the action be maintained as a class action.

The basic thrust of the complaint is that the actions of the defendants constitute an illegal monopoly in restraint of trade. The plaintiff charges that the defendants adopted their policy of not accepting abbreviations in real estate ads to unjustly enrich themselves at the expense of the advertisers.

The plaintiff states that the defendants' conduct violates the First Amendment to the Constitution of the United States; Article 1, § 19 of the Constitution of Tennessee; and Article 1, § 22 of the Constitution of Tennessee. No specific reference is made to any statute prohibiting illegal combinations in restraint of trade. Construed liberally, the complaint can be read to charge the defendant with a violation of the Sherman Anti-Trust Act, 15 U.S.C. § 1, et seq.[1]

II

Motions for Summary Judgment

The defendants have filed a motion for summary judgment. The first part of the motion is in the nature of a motion to dismiss for failure to state a claim upon which relief can be

[1] Section one of the act makes illegal every contract combination, or conspiracy in restraint of trade or commerce. 15 U.S.C. § 1. Section two declares it to be a crime to monopolize, or attempt to monopolize, or combine or conspire to monopolize trade or commerce. 15 U.S.C. § 2.

granted. The second part of the motion seeks a resolution of the factual allegations and a determination as to the reasonableness of the defendant's conduct.

The defendants assert three grounds in support of the first part of their motion. They are as follows:

(1) The defendants have an absolute right to accept or reject advertisements and may impose such conditions on advertisements as they choose.

(2) The defendants are expressly exempted from the operation of anti-trust laws by the provisions of the Newspaper Preservation Act, 15 U.S.C. § 1801, et seq.

(3) The defendants have an absolute right under the First Amendment to the United States Constitution to refuse to publish any advertisement they do not desire to publish.

The plaintiff's motion for summary judgment states no grounds therefor and does not request any relief. The motion presents nothing upon which the Court can rule.[2]

III

Issue Presented

The issue raised by the defendants' motion for summary judgment is whether this Court has the authority to direct that the defendant newspapers and their agent make specific decisions regarding the content of their advertisements. Stated another way, to what extent can government regulate the advertising content of newspapers?

[2] Rule 7.02(1), TRCP, directs that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Plaintiff's motion for summary judgment does not comply with that rule.

IV

Newspaper's Absolute Right to Control Advertising

The first ground asserted in the defendants' motion for summary judgment is that the defendants are under no obligation to accept the plaintiff's advertisements. Likewise, they say they may impose any conditions upon the content of advertisements they may choose to impose. The defendants would find comfort in the opinion voiced by Justices Stewart and Douglas when they expressed their view that no ". . . government agency —local, state or federal—can tell a newspaper in advance what it can print and what it cannot." *Pittsburg Press Co. v. Human Relations Commission*, 413 U.S. 376, 400, 37 L. ed.2d 669, 93 Sup. Ct. 2553 (1973).

The right of the defendants to publish advertisements in whatever manner they deem appropriate is not as absolute as the defendants would suggest, however. In *Pittsburg Press*, the Supreme Court approved a bar against employment advertising specifying "male" or "female" preference, and Congress has prohibited the publishing of racially discriminatory notices relating to the sale or rental of residential property. Civil Rights of 1968, 48 U.S.C. § 3604(c).[3]

However, the existence of laws prohibiting advertising in the classified section of a newspaper in a sexually and racially discriminatory manner cannot be construed by this Court as authority for allowing broad controls by government, in this case the Courts, over the advertising content of newspapers.

With the exception of one reported case, the Courts have universally held that in the absence of circumstances amounting

[3] The Fourth Circuit Court of Appeals has faced the issue of whether that provision of the 1968 Civil Rights Act runs afoul of the First Amendment and held that the statute regulating newspaper advertising is constitutional. *United States v. Hunter*, 469 F.2d 205 (4th Cir. 1972).

to an illegal monopoly or conspiracy, the publisher of a newspaper or magazine is not required by law to accept and publish an advertisement. 18 A.L.R.3d 1286 (1968). If the newspaper has the right to accept or reject advertising as it pleases, it must necessarily follow then that the newspaper has the right to regulate the content of the advertising.

The Court concludes that the defendants herein have an absolute right to either accept or reject the plaintiff's advertisement and regulate the contents thereof. There are certain narrow exceptions to that absolute right. Plaintiff's case does not fall within those exceptions. And the denial of advertising access and control over the content must not be exercised in such a manner as to constitute an illegal monopoly or conspiracy in restraint of trade.

V

Application of Laws Prohibiting a Monopoly

The Courts must focus on whether defendants' conduct constitutes an illegal monopoly. The defendants assert that even if they are engaged in a course of conduct which might constitute an illegal monopoly and violate federal and state anti-trust statutes, their activities are exempt from the reach of the anti-trust statutes by the Newspaper Preservation Act, 15 U.S.C. §1801, et seq.

The declared congressional policy of the Newspaper Preservation Act is clearly stated in the act itself. Realizing the public's interest in maintaining two or more editorially and reportorially independent and competitive newspapers in a given market area, Congress has allowed a combination of certain of the mechanical aspects of the newspaper operation and has specifically exempted such a combination from the purview of anti-trust laws. The functions of the newspaper operation which may be combined include printing, distribution, advertising solicita-

tion, establishment of advertising rates, and establishment of circulation rates.[4]

The record does not fully disclose the precise nature of the relationship between the three corporate defendants, the Newspaper Printing Corporation, Tennessee Newspapers, Inc., and the Nashville Banner Publishing Company, Inc. The Court must arrive at some determination of the nature of the relationship before it can ascertain the applicability of the Newspaper Preservation Act. The complaint states that the NPC is owned by the other two corporations; that the two latter corporations are engaged in the publication of newspapers; and that the defendant NPC acts as agent for the newspaper companies in the soliciting, processing, printing and dissemination of advertisements. The Court concludes that the three defendants are operating under a "joint newspaper operating arrangement" as defined by sub-section (2), 18 U.S.C. §1802. As such, the defendants enjoy the protection afforded by Congress by the Newspaper Preservation Act.

The protection afforded newspapers and their operating companies by the act from the provisions of the Sherman Anti-Trust Act was considered by the U. S. District Court, Northern District of Indiana, in *America's Best Cinema Corp. v. Fort Wayne Newspaper's Inc.*, 347 F. Supp. 328 (N.D. Ind. (1972). In Fort Wayne two newspapers formed a corporation, Fort Wayne Newspapers, Inc., which acted as the advertising agent for both Fort Wayne daily newspapers. Fort Wayne Newspapers, Inc., adopted a policy of rejecting advertising from theaters "which

[4] It would be difficult to conceive of a market area in which the declared policy of Congress of maintaining two editorially independent newspapers has achieved such dramatic success as it has in the Nashville area. No doubt, the philosophical differences vigorously adhered to by the *Tennessean* and the *Nashville Banner* and the zeal with which the two papers pursue their objectives exceed the most optimistic expectations of Congress in enacting the Newspaper Preservation Act.

habitually show only unrated adult films, or those with an MPA X-rating." *Ibid.* at 331.

The plaintiffs, owners and operators of establishments which exhibited adult films, brought suit against the newspapers and the operating company. The plaintiffs alleged that the defendants violated Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§1 and 2. The Court noted that a single newspaper could have adopted a policy of rejecting such advertising and that such action by a single newspaper would not be an illegal combination or conspiracy.

The question then became whether the advertising policy decision violated anti-trust laws because it was made by a combination of newspapers operating under a joint operating arrangement. The Court held that the Newspaper Preservation Act allowed a combination of newspapers to engage in conduct which an individual newspaper could engage. Therefore, the action of the Fort Wayne papers and their agent, acting in combination, did not violate the Sherman Anti-Trust Act prohibition against unlawful combinations because of the exemption granted by the Newspaper Preservation Act.

The ruling of the District Court in the case is most persuasive. Unquestionably, the *Tennessean* or the *Banner* could, operating independently, adopt a policy of rejecting advertising with a specified content. One might adopt such a policy, neither might, or both might. But, the *Tennessean* and *Banner* have combined to adopt a policy. Such a combination may well constitute an illegal combination in restraint of trade in violation of the Sherman Act. Congress, however, has exempted such a combination from the reach of anti-trust statutes. Therefore, the actions complained of by the plaintiff herein are not unlawful.

Sub-section (c) of 15 U.S.C. §1803, however, provides an exception to the exemption. The defendants will not be per-

mitted to violate any anti-trust law which prohibits predatory pricing, any predatory practice, or any *other conduct* in the otherwise lawful operations of a joint newspaper operating arrangement *which would be unlawful under any anti-trust law if engaged in by a single entity*. The Court concludes that the conduct complained of on the part of the plaintiff herein does not fall within this exception. As already noted, one newspaper could adopt an advertising policy excluding certain abbreviations. It is not illegal merely because it is done in combination.

VI

Application of the First Amendment

The final assertion of the defendants' motion for summary judgment is that the First Amendment to the United States Constitution guarantees the right of the papers and their agent to refuse to publish any advertisement they do not desire to publish. Interestingly, the plaintiff also relies upon the First Amendment as a jurisdictional basis for his suit.

The plaintiff joins the ranks of those who advocate government enforced access to the press. Like other proponents of enforced access, he relies upon the First Amendment to support the concept. The concept is not wholly without merit. The entire communications-news industry in the United States is becoming increasingly centralized, as exemplified by the joint advertising programs operated by the detendants in Nashville.

As it applies to the press, the First Amendment states:

> "Congress shall make no law . . . abridging the freedom . . . of the press."

The First Amendment, which preserves so many rights Americans hold sacred, extends to all levels of government, not just Congress, and, Congress has specifically provided protection to citizens of the First Amendment Rights. 42 U.S.C. §1983. The

First Amendment and the federal statutes are designed to protect citizens against the action of *government* which deprive them of their freedom. Absent any allegations of any governmental action in the implementation of the advertising policy of the defendants, the plaintiff has stated no claim under the First Amendment.

The notion that government can dictate a newspaper's content, something the plaintiff is asking this arm of government to do, was soundly rejected by the United States Supreme Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 41 L.Ed.2d 730, 94 Sup. Ct. 2831 (1974). In that case the Supreme Court struck down a Florida statute which required newspapers to publish the reply of a candidate for public office to an editorial or other charge made against the candidate by the newspaper. Relying upon the First Amendment, the Supreme Court reaffirmed the principle that it is not the business of government to dictate the content of newspapers. This Court can find nothing in the *Miami Herald* decision which would indicate that its application is limited to the news portion of the paper and that it is not applicable to the advertising portions of the paper as well. The Court concludes that the First Amendment protects the defendants' right to control the advertising content of the newspapers.

Conclusion

The Court concludes that, except for narrow exceptions, the defendants have an absolute right to control the advertising content of Nashville's two daily newspapers. That right is grounded upon the freedom of the press guarantee of the First Amendment to the United States Constitution. The narrow exceptions have no application to this case. The defendants cannot engage in conduct which would constitute a monopoly and illegal combination in restraint of trade. The Newspaper Preservation Act exempts the defendants from the reach of federal and state anti-trust laws.

Therefore, the complaint does not state a claim upon which relief can be granted. Having made such a determination on the first part of defendants' motion, is unnecessary to decide the issue raised by the second part of the motion for summary judgment.

The plaintiff's case is dismissed. Costs are taxed to the plaintiff and his surety. Counsel for defendants will prepare the decree and provide for the allowance of an appeal by the plaintiff.

ROBERT S. BRANDT, Chancellor

This December 16, 1976

cc: Mr. Alfred Knight
Mr. John Wilkes

Judge Charles Galbreath

APPENDIX B

In the Court of Appeals of Tennessee
Western Section Sitting at Nashville

Charles Gabreath,
Appellant,
vs.
Newspaper Printing Corporation, et al.,
Appellees.

Davidson Equity

From Part III of the Chancery Court of Davidson County, Tennessee, Honorable Robert S. Brandt, Chancellor

John H. Wilkes and Don Gregory of Nashville, Tennessee For Appellant

Willis & Knight, Alfred H. Knight, III of Nashville, Tennessee For Appellees

REVERSED AND REMANDED

Opinion filed: October 23, 1977

NEARN, J.

MATHERNE, J. (Concurs)

RUSSELL, Sp. J. (Not Participating)

The Trial Judge granted defendants' motion for summary judgment and plaintiff has appealed.

The complaint describes the defendants as follows:

> "Defendant Newspaper Printing Corporation is a Tennessee Corporation wholly owned by the defendants Tennessean Newspapers, Inc. and The Nashville Banner Publishing Company, all of 1100 Broad Street, Nashville, Tennessee, and all are organized and doing business under

the laws of the State of Tennessee. The latter two defendants are engaged in the publication of the newspapers, The Tennessean and Nashville Banner, respectively, with daily circulations of many hundreds of thousands of copies throughout the advertising area involved. The defendant Newspaper Printing Corporation represents the other defendants as their agent for the solicitation and processing of advertisement and the printing and dissemination of same."

Plaintiff alleges that he submitted the following proposed advertisement to Newspaper Printing Corporation to be printed in the classified ad section of both defendant newspapers:

"West End Area—Lge. apt. 4 rms. 1 b.r. Cent. heat and a/c. Drps. Shag cpts. frost free ref. Gar. dis. ds. washer, $145—352-4066."

It is further alleged that the advertisement was rejected by the defendants and would not be accepted by either newspaper unless abbreviations were eliminated. Plaintiff then alleged that defendant newspapers are the only ones of general circulation in the area thus plaintiff was forced to choose between not advertising his property or incurring additional expense because publishing without abbreviations would require 33⅓ percent more space and cost.

Broadly considered, the complaint charged the defendants with monopolistic, conspiratorial, predatory pricing or practice in violation of Article 1, Section 22 of the Constitution of the State of Tennessee and in violation of the First Amendment of the U. S. Constitution.

The defendants first filed a motion for summary judgment with the following affidavit attached:

"The Affiant, Steve Harper, deposes and says:

"I am the Director of Advertising for the Newspaper Printing Corporation and have held this position for the past six years. Prior to that time I was the manager of classified advertising for the Newspaper Printing Corporation. During the entire period of my employment, Newspaper Printing Corporation has had a policy of rejecting classified advertisements that contain abbreviations. So far as I am aware, this has been the policy of the Company since it began doing business.

"The purpose of this policy is to make our classified advertisements easily intelligible to the average reader. The use of abbreviations tends to make classified ads unclear and unattractive, and in my opinion it greatly impairs their usefulness. Over the years, I have had many discussions with those in charge of classified advertising for newspapers that permit abbreviations, and their general opinion is that the use of abbreviations is undesirable. I am also aware of the results of surveys that have been taken indicating that a very high percentage of readers do not know the meaning of commonly used abbreviations. These surveys indicate, for example, that the abbreviation "br" is variously interpreted to mean bedroom, bathroom, or brick; that "AC" is interpreted to mean air conditioning or AC current; that "furn" is interpreted to mean furnished or furnace, and that a very high percentage of those questioned had no opinion as to the meaning of these and similar abbreviations. In addition, while some of the more commonly used abbreviations are fairly intelligible, some advertisers use abbreviations that are completely unintelligible. It would be very burdensome for us to attempt to edit all of the ads submitted to us, rejecting abbreviations we felt were not sufficiently clear and permitting the others. The only reasonable way to maintain the clarity we want in our classified advertis-

ing section is to reject all advertising containing abbreviations."

Plaintiff responded with his own affidavit as follows:

"The Affiant, Charles Galbreath, having been first duly sworn, deposes and says by way of response to the affidavit filed in support of the defendants' motion for summary judgment:

"He is advised that the policy complained of, which is rejecting the use by advertisers of abbreviations by the Newspaper Printing Corporation, is not for the purpose of achieving clarity and attractiveness but simply to increase revenue.

"It is not merely the general opinion but it is the firmly established practice in all marketing areas in which the printed advertising media operates in competitive fashion, vis-a-vis the monopolistic fashion permitting predatory pricing and gouging in which the defendants operate to permit those advertisers who choose to do so to economize by the use of abbreviations. Some of the thousands of newspapers in which abbreviated classified ads are accepted include The New York Times, The Miami Herald, The Louisville Courier, The Memphis Commercial Appeal, The Cincinnati Enquirer, The Chicago Tribune, The Boston Globe, The San Francisco Examiner, The St. Louis Post Dispatch, The Los Angeles Times, Chattanooga Times, The Dallas Morning News, The Knoxville News Sentinel, and even The Washington Post.

"In point of fact affiant has been unable to find one single newspaper in Tennessee, the United States, or even the world that does not permit classified advertisements utilizing non-standard abbreviations.

"Some of the frequently used non-standard abbreviations noted in a cursory survey of the newspapers inspected

at the Nashville Public Library in the above listed periodicals are: "apt." for apartment, "rm." for room, "hyd." for hydrolic, "brkfst." for breakfast, "cyl." for cylinder, "rec." for recreation, "bsmt." for basement, "eves." for evenings, "w/" for with, "nr." for near, and "vu." for view.

"He is advised that the use of non-standard abbreviations are so universally understood and accepted that a famous prize winning play on the Broadway Stage, later adapted for television where it also won critical acclaim, was entitled, "6 rms. Riv. Vu," which the public understood to mean, "Six rooms, River View."

"Affiant has ascertained that the average sixth grade child has no difficulty in reading and fully understanding non-standard abbreviations used by daily newspapers in every area of the civilized world except Nashville, Tennessee.

"Affiant is a frequent user of advertising and familiar with advertising opportunities in Davidson County. The defendants have no competition in the field of classified advertising and have thus developed a monopoly.

"To suggest to the Court, as the witness Steve Harper does in his affidavit, that the citizens of Nashville are not able to read and easily understand as well as those in Memphis, Knoxville, Chattanooga, New York, Chicago, Detroit, etc., is an undeserved imputation on the intelligence of the very public his employer seeks to serve. Affiant avers that the defendants may be correct in their direct inference that Nashvillians are dumber than most people, but they are not that dumb."

The defendant also filed an answer which denied any acts violative of either Federal or State Constitutions and alleged that defendants' pricing method and the refusal of abbreviated

advertisements could not be considered by the Court as monopolostic practices because defendants were expressly exempted from the operation of antitrust laws by the provisions of the Newspaper Preservation Act, 15 U.S.C. § 1801, et seq.

The Chancellor filed a comprehensive memorandum upon sustaining defendants' motion for summary judgment. The Chancellor recognized that the affidavits might present a fact issue as to the reasonableness of the defendants' joint pricing policy, but was of the further opinion that such issue would be immaterial. This conclusion was based upon his understanding of the public policy as stated in 15 U.S.C. § 1801[1] and the definition of joint newspaper operation in 15 U.S.C. § 1802(2)[2] which establishes an exemption from antitrust legislation for such operations. An exception to the exemption is set forth in

---

[1] "§ 1801. Declaration of policy

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this Act [15 USCS §§ 1801 et seq.]."

[2] "§ 1802. Definitions

As used in this Act [15 USCS §§ 1801 et seq.]—

(1) . . .

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: Provided, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined."

15 U.S.C. § 1803(c).[1] The Chancellor was of the opinion that since a newspaper acting as a single entity may charge what it will and refuse whatever advertisements it might choose (see *Pittsburgh Press Co. v. Human Relations Commission* (1973) 413 U.S. 376, 37 L.Ed. 2d 669, 93 S.Ct. 2553; *Staff Research Assoc., Inc. v. Tribune Co.* (1965 CA 7 Ill) 346 F 2d 372), there could be nothing unlawful in the joint association doing the same thing. The Chancellor felt buttressed in his position by the Federal District Court case of *America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc.* (1972) 347 F.Supp. 328.

We agree with the Chancellor that a fact issue is presented by the affidavits and pleading, that is, whether the defendants are engaged in predatory pricing or practice, but disagree with his conclusion that such fact, if present, is permissible under 15 U.S.C. §§ 1802(2) and 1803(c).

It should first be noted that neither the *Fort Wayne* case, supra, nor any other federal case found by the Court dealing with this problem in relationship to 15 U.S.C. § 1803(c) has been disposed of on summary judgment. Each and every case has gone to a full trial before the trier of facts to determine if, in fact, the joint newspaper operation has engaged in conduct which is predatory or otherwise outside the limited exemption granted to joint operating agreements. *Bay Guardian Co. v. Chronicle Publ. Co.* (1972) 344 F.Supp. 1155; *Fort Wayne*, supra.

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[1] "§ 1803. Antitrust exemption

(c) Nothing contained in the Act [15 USCS §§ 1801 et seq.] shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this Act 15 [USCS §§ 1801 et seq.], no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law."

Any agreement at price fixing is unlawful under the antitrust laws. See *Associated Press v. U.S.* (1945) 326 U.S. 1, 89 L. Ed. 2013, 65 S.Ct. 1416, *rehearing denied*, 326 U.S. 802, 90 L. Ed. 489, 66 S.Ct. 6; *Lorain Journal Co. v. U.S.* (1951) 324 U.S. 143, 96 L. Ed. 162, 72 S.Ct. 181; *Union Leader Corp. v. Newspapers of New England, Inc.* (1959 D.C. Mass.) 180 F.Supp. 125, *aff. in part and remanded in part* (CA 1) 284 F. 2d 582, *cert. denied*, 365 U.S. 890, 6 L. Ed. 2d 201, 81 S.Ct. 1026. Because of its unique position in our Republic, as guaranteed by the Constitution, it is the undeniable aim of the Newspaper Preservation Act to assist that industry in its financial survival. But, such assistance is by statutory permission and is limited to allow newspapers to engage in some business acts that would be considered monopolistic and illegal if attempted by others. *Newspaper Guild v. Levi* (1976) 539 F. 2d 755. A violation of the antitrust laws by a business not so privileged by Congress is a punishable violation regardless of intent. Therefore, Congress has provided by the adoption of the Newspaper Preservation Act, that newspapers may engage in certain acts, joint ownership of presses, advertising departments, etc., without any stigma of illegality, although such are *per se* illegal if done by others. However, the purpose of 15 U.S.C. § 1803(c) is to point out that those acts forbidden to others but allowed to newspapers may be done so long as they are not predatory in nature. Subsection (c) of § 1803 provides that in no event shall the joint newspaper operation engage in *predatory* pricing or *predatory* practice. Whether an act is predatory or not is generally a matter of disputed fact over which reasonable minds might differ. As noted in the *Fort Wayne* case, supra, in cases where courts have been called upon to restrain newspapers from refusing to accept advertising, the test has always been one of reasonable purpose or motive. The test is whether the joint newspaper operation had an anticompetitive purpose or effect in adopting the complained of policy or whether its acts were reasonable. Therefore, in general, the case must be decided by the trier of the

facts after hearing all the proof. See generally, *Bay Guardian*, supra; *Lorain Journal Co.*, supra; *Union Leader Corp.*, supra; *Syracuse Broadcasting Corp. v. Newhouse* (1956, CA 2 NY) 236 F. 2d 522, (1963, CA 2 NY) 319 F. 2d 683. No single newspaper entity prior to the Newspaper Preservation Act could engage in an anticompetitive conspiracy with another and, although the *operation* is now joint, the Banner and The Tennessean are separate entities and they may conspire. See *Bay Guardian*, supra; *Fort Wayne*, supra; *Kansas City Star Co. v. U.S.* (1957, CA 8 MO) 240 F. 2d 643, *cert. denied*, 354 U.S. 923, 1 L. Ed. 2d 1438, 72 S.Ct. 1381.

In this case, whether the complained of act of the defendants was reasonable or was anticompetitive and predatory in nature and intent, must be determined by the trier of facts after hearing of proof; not on summary judgment.

For the reasons stated, the matter should not have been disposed of on summary judgment, therefore, the judgment of the Trial Court is reversed and the case remanded for a trial of the issues.

Costs of appeal are adjudged against the defendants. Costs below will await the outcome of the trial.

Done at Nashville in the two hundred and second year of our Independence and in the one hundred and eighty-second year of our Statehood.

NEARN, J.

MATHERNE, J. (Concurs)

RUSSELL, Sp. J. (Not Participating)

APPENDIX C

Newspaper Printing Corporation, Tennessean Newspapers, Inc. and the Nashville Banner Publishing Company, Petitioners,

v

Charles Galbreath, Respondent.

Supreme Court of Tennessee

May 7, 1979

Consumer brought action against newspapers and their publisher alleging that newspapers' refusal to publish classified advertising containing abbreviations violated State and Federal Constitutions. The Chancery Court, Davidson County, Robert S. Brandt, Chancellor, sustained defendants' motion to dismiss, and plaintiff appealed. The Court of Appeals reversed and remanded and petition for certiorari was granted. The Supreme Court, Brock, J., held that: (1) publisher of newspaper has right to condition its acceptance of advertising upon its being in form satisfactory to newspaper and it may require that advertisements submitted to it for publication comply with such rules and regulations as publisher deems proper; (2) neither freedom of press provisions of First Amendment to Constitution of United States nor of Constitution of Tennessee create right in consumer to publish his advertisements containing abbreviations, and (3) refusal of newspapers to accept tendered advertising because it failed to meet standards required by publisher did not amount to "predatory pricing or practice" as those terms are used in antitrust laws; as used in such laws, "predatory" refers to pricing or other action aimed at competitors rather than gouging of consumers.

Judgment of Court of Appeals reversed.

1. **Newspapers** Key 6¼

Newspaper publisher is under no legal obligation to sell advertising to all who apply for it and is not required to accept for publication any advertisement, although in proper form, even though charge which newspaper makes for publishing like advertisements is tendered.

2. **Newspapers** Key 6¼

Newspaper publishers may refuse to publish whatever advertisements they do not desire to publish, even though newspaper in question may enjoy virtual monopoly in area of its publication.

3. **Newspapers** Key 6¼

Publisher of newspaper has right to condition its acceptance of advertising upon its being in form satisfactory to newspaper and its being placed in classification which, in judgment of newspaper, will result in truthful and convenient disclosure to its readers; since it may refuse to publish at all, it may require that advertisements submitted to it for publication comply with such rules and regulations as publisher deems proper.

4. **Constitutional Law** Key 90.1(8)

Neither freedom of press provisions of First Amendment to Constitution of United States nor of Constitution of Tennessee impose duty upon newspaper publisher nor create correlative right in consumer to publish his advertisements containing abbreviations. U.S.C.A.Const. Amend. 1; Const. art. 1, § 19.

5. **Constitutional Law** Key 90.1(1), 240(1)

Freedom of press, like other freedoms, is not absolute; thus, constitutional rights of others such as right to equal treatment under equal protection clause of Fourteenth Amendment, require recognition of narrow exceptions to otherwise complete

freedom of publisher to publish or refuse to publish as he pleases. U.S.C.A.Const. Amends. 1, 14.

6. **Monopolies** Key 12(3)

Refusal of newspapers to accept tendered advertising because it fails to meet standards required by publisher, whether acting singly or jointly, does not amount to "predatory pricing or practice," as those terms are used in antitrust laws; as used in such laws, "predatory" refers to pricing or other action aimed at competitors rather than "gouging" of consumers. Const. art. 1, § 22; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; Newspaper Preservation Act, § 4(c), 15 U.S.C.A. § 1803(c).

See publication Words and Phrases for other judicial constructions and definitions.

7. **Monopolies** Key 12(3)

Joint action of two city newspapers and their publisher in refusing to accept advertising containing abbreviations did not come within exception contained in section of Newspaper Preservation Act excepting predatory pricing practices from provisions of Act exempting newspapers from certain antitrust laws. Newspaper Preservation Act, §§ 2 et seq., 3(2), 4(c), 15 U.S.C.A. §§ 1801 et seq., 1802(2), 1803(c).

Alfred H. Knight, III, Nashville, for petitioners; Willis & Knight, Nashville, of counsel.

Charles Galbreath, pro se.

OPINION

BROCK, Justice.

The plaintiff, Charles Galbreath, sought to purchase from the defendant newspapers, Tennessean Newspapers, Inc., and The

Nashville Banner Publishing Company, and their jointly controlled publishing company, defendant Newspaper Printing Corporation, advertising space for publication of the following advertisement:

> "West End Area—Lge. apt. 4 rms. 1 b.r., Cent. heat and a/c Drps. Shag cpts. frost free ref. gar. dis. ds. washer. $145—352-4066."

The defendant, Newspaper Printing Corporation, to whom the proposed advertisement was submitted, refused to accept it in the foregoing form and agreed to publish it only after it was modified to read as follows:

> "West End Area—Large apartment, 4 rooms. 1 bedroom. Central heat and air conditioning. Drapes. Shag carpet, frost free refrigerator. Garbage disposal. Dishwasher. $145. 352-4066."

The action of the defendants prompted the plaintiff, Galbreath, to file this class action in his own behalf and on behalf of all others similarly situated, seeking relief by way of a mandatory injunction requiring the defendant newspapers and their publishing company to "print all advertising, not violative of any law, as composed by the author of same upon the payment or offer of payment of the usual rate," and requiring "that the defendant cease censoring and modifying advertising copy submitted to it for publication by the plaintiff, Charles Galbreath, and all others similarly situated." The complaint also prayed for damages for "the excessive costs incurred because of the arbitrary, invalid and unconstitutional acts of the defendants," and for an award of reasonable attorneys fees and costs.

> The plaintiff alleges that the defendants ". . . have a monopoly in the metropolitan area of Nashville, Tennessee, in that only through the latter defendant [Newspaper Printing Corporation] may advertisement in newspapers with large

daily circulations be published. That because of this monopoly there is no competition and the plaintiff and others similarly situated have no recourse but to submit to the excessive charges resulting from the arbitrary refusal of the Newspaper Printing Corporation to accept advertising copy utilizing the universally recognized economical method of reducing advertising costs by using abbreviations recognized in the trade of the business involved.

"That the only reason the defendants refuse to permit liberal use of abbreviations in copy for advertisement is to unjustly enrich themselves at the expense of the advertiser consumer who, because of the monopoly enjoyed by the defendants, has no other source of advertisement in large daily newspapers in the area of the plaintiff's business activities."

The plaintiff further alleges that the refusal of the defendants to publish his tendered advertisement, as above quoted, was "wrongful and arbitrary" and ". . . forced the plaintiff against his will to allow the advertisement to be censored and changed so as to eliminate the economical use of abbreviations as customarily permitted in other advertising markets of the nation in the newspapers, and, forced him to choose between not advertising his property or incurring the substantial additional expense of having the advertisement published without abbreviations so as to require 33½ percent more space and resulting costs."

In stating his legal theory, plaintiff alleges that the policy of the defendants in refusing to accept advertisements containing abbreviations is unreasonable, capricious and arbitrary ". . . and violative of the First Amendment to the Constitution of the United States and Art. I, § 19, of the Constitution of Tennessee, in that they restrict freedom of the press and because said policy and standards being direct outgrowths of a monopoly

the resulting unfair competition is violative of Art. I, § 22, of the Constitution of Tennessee."[1]

The defendants filed a motion for summary judgment coupled with a motion to dismiss the complaint upon the ground that it failed to state a claim upon which relief could be granted. The Chancellor sustained the motion to dismiss, holding that the complaint failed to state a cause of action. Upon appeal, the Court of Appeals reversed the Chancellor's order of dismissal and remanded the case for trial on the merits. We granted the petition for certiorari filed by the defendants.

I

[1] The publication of a newspaper is strictly the private business of its publisher, and it has been aptly observed that a publisher "in publishing a paper, assumes no 'office, trust, or station' in a public sense, nor does he enter into any public or contractual relation with the community at large. The rights and liabilities of newspaper publishers arising out of contracts are therefore governed by the rules applicable to contracts generally." 58 Am.Jur.2d *Newspapers, Periodicals, Etc.* § 20 (1971). Moreover, it is well settled in this country that a newspaper publisher is under no legal obligation to sell advertising to all who apply for it, and is not required to accept for

---

[1] As pertinent here, Art. I, § 19, of the Constitution of Tennessee provides:

"That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

Art I, § 22, of the Constitution of Tennessee provides:

"That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed."

publication any advertisement, although in proper form, even though the charge which the newspaper makes for publishing like advertisements is tendered. *Burke v. Kingsport Publishing Corporation,* 377 F.Supp. 221, *aff'd* 497 F.2d 923 (1974); *In re Louis Wohl, Inc.,* 50 F.2d 254 (Mich.App. 1931); *J. J. Gordon, Inc. v. Worcester Telegram Publishing Co.,* 343 Mass. 142, 177 N.E.2d 586 (1961); *Bloss v. Federated Publications, Inc.,* 5 Mich.App. 74, 145 N.W.2d 800 (1966), *aff'd* 380 Mich. 485, 157 N.W.2d 241 (1968); *Camp-of-the-Pines, Inc. v. New York Times Co.,* 184 Misc. 389, 53 N.Y.S.2d 475 (1945); *Approved Personnel, Inc. v. Tribune Company,* 177 So.2d 704, 18 A.L.R.3d 1277 (Fla.App.1965); *Shuck v. Carroll Daily Herald,* 215 Iowa 1276, 247 N.W. 813, 83 A.L.R. 975 (1933); *Friedenberg v. Times Pub. Co.,* 170 La. 3, 127 So. 345 (1930); *Mid-West Elec. Coop. v. West Texas Chamber of Comm.,* 369 S.W.2d 842 (Tex.Civ.App. 1963); *Modla v. Tribune Publishing Company,* 14 Ariz.App. 82, 480 P.2d 999 (1971).

[2, 3] Newspaper publishers may refuse to publish whatever advertisements they do not desire to publish and this is true even though the newspaper in question may enjoy a virtual monopoly in the area of its publication. *Shuck v. Carroll Daily Herald, supra; J. J. Gordon, Inc. v. Worcester Telegram Publishing Co., supra; Mid-West Elec. Coop. v. West Texas Chamber of Comm., supra;* 66 C.J.S. *Newspapers* § 21(c) (1950). *Cf. Uhlman v. Sherman,* 31 Ohio Dec. 54, 22 Ohio N.P.,N.S., 225, *Herald Company v. Seawell,* 472 F.2d 1081 (Colo.App. 1972). The publisher of a newspaper has the right to condition its acceptance of advertising upon its being in a form satisfactory to the newspaper and its being placed in a classification which, in the judgment of the newspaper, will result in a truthful and convenient disclosure to its readers. In short, since it may refuse to publish at all, it may require that advertisements submitted to it for publication comply with such rules and regulations as the publishers deem proper.

II

[4, 5] The plaintiff asserts that the freedom of the press provisions of the First Amendment to the Constitution of the United States and of Art. I, § 19, of the Constitution of Tennessee impose a duty upon the defendants and create a correlative right in the plaintiff to publish his advertisements containing abbreviations, as hereinabove quoted. This assertion of the plaintiff is unsupported by either authority or reason. Indeed, the command of those constitutional provisions requires the opposite conclusion, *i. e.,* freedom of the press means freedom not to publish, as well as freedom to publish, as the publisher sees fit. As noted by the Iowa court in *Shuck v. Carroll Daily Herald, supra,* if a newspaper may be required to accept an advertisement, it may also be compelled to publish a news item or an editorial.[2]

III

The attempt by the plaintiff to rely upon the anti-monopoly provision of our Constitution is quite obscure; consequently, we are not certain what his theory is. He avers that the policy of the defendants in refusing to accept advertisements containing abbreviations is "unreasonable, capricious and arbitrary" and that

> ". . . said policy and standards, being direct outgrowths of a monopoly, the resulting unfair competition is violative of Art. I, § 22 of the Constitution of Tennessee."

---

[2] Of course, freedom of the press, like other freedoms, is not absolute. Thus, the constitutional rights of others, such as the right to equal treatment under the equal protection clause of the Fourteenth Amendment, require the recognition of narrow exceptions to the otherwise complete freedom of the publisher to publish or refuse to publish as he pleases. *See, Pittsburgh Press Co. v. Pittsburgh Com'n on Human Rel.,* 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); *United States v. Hunter,* 459 F.2d 205 (4th Cir. 1972); Civil Rights Act of 1968, 42 U.S.C. § 3604(c). Nor does freedom of the press authorize the newspaper to "attempt to monopolize" in violation of the Sherman Antitrust Act. *Lorain Journal Co. v. United States,* 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951).

He also alleges that the defendants

> ". . . have a monopoly in the metropolitan area of Nashville, Tennessee, in that only through the latter defendant (Newspaper Printing Corporation) may advertisements in newspapers with large daily circulations be published. That because of this monopoly there is no competition and the plaintiff and others similarly situated have no recourse but to submit to the excessive charges resulting from the arbitrary refusal of the Newspaper Printing Corporation to accept advertising copy utilizing the universally recognized economical method of reducing advertising costs by using abbreviations recognized in the trade of the business involved."

Both the Chancellor and the Court of Appeals have treated the complaint as alleging a violation of the Federal antitrust laws, a construction which we consider to be generous.[3]

The trial court held that the practice of the defendants in jointly refusing to accept for publication advertisements containing abbreviations such as that tendered by the plaintiff was authorized by the Newspaper Preservation Act, 15 U.S.C., §§ 1801, *et seq.*, thus furnishing no basis for an action by the plaintiff. Section 2 of that Act provides:

> "Congressional declaration of policy
>
> "In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive

[3] Since both parties and both lower courts have treated the case as one alleging a violation of the Federal antitrust laws, we confine our discussion to that theory and do not determine whether the anti-monopoly provision of Art. I, § 22, of the Constitution of Tennessee is self executing and may furnish the basis for a civil action by one who claims that another has violated that provision. *See, The Charles River Bridge v. The Warren River Bridge et al.*, 36 U.S. 420, 11 Pet. 420, 9 L.Ed. 773 (1837); *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (1899); 58 C.J.S. *Monopolies* §§ 1, 27 (1948).

> in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter 14 U.S.C.S., §§ 1801, *et seq.*]."

Also pertinent here is § 1802(2) which provides:

> "As used in this chapter [15 U.S.C.S., §§ 1801, et seq.]—
>
> * * * * * * *
>
> "(2) The term 'joint newspaper operating arrangement' means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken, with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution; *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined."

The Court of Appeals, while agreeing that the Newspaper Preservation Act applies, was of the opinion that the complaint alleged predatory pricing or practice which was not authorized by that Act. It relied upon § 4(c) of the Act which provides:

> "Antitrust exemption[s]
>
> * * * * * * *

> "Nothing construed in the chapter [15 U.S.C.S., §§ 1801, *et seq.*] shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law."

The Court of Appeals further concluded that whether the joint advertising policy of the defendants constituted predatory pricing or practice presented a factual issue which required that the motion for summary judgment be denied. Accordingly, that court reversed the judgment of the trial court and remanded for a trial on the merits.

6] The refusal of a newspaper to accept tendered advertising because it fails to meet the standards required by the publisher, whether acting singly or jointly, does not amount to "predatory pricing or practice," as those terms are used in the antitrust laws. As used in such laws, "predatory" refers to pricing or other action aimed at competitors rather than the "gouging" of consumers. *See, International Air Ind., Inc. v. American Excelsior Co.*, 517 F.2d 714, 722 (5th Cir. 1975).

It has been held that the rejection by a newspaper, acting singly, of advertising because it does not meet the publisher's requirements does not violate the antitrust laws. *Staff Research Associates, Inc. v. Tribune Company*, 346 F.2d 372 (7th Cir. 1965).

[7] It follows, then, that the joint action of the defendants in refusing to accept such advertising does not come within the exception contained in § 4(c) of the Newspaper Preservation

Act, above quoted, it being one which would not be unlawful if engaged in by a single entity.

We, therefore, conclude that the Court of Appeals erred in reversing the judgment of the Chancellor and in remanding this case for trial on the merits. The judgment of the Court of Appeals is reversed and that of the trial court is affirmed. Costs incurred in this Court will be taxed against the respondent.

HENRY, C. J., and FONES, COOPER and HARBISON, JJ., concur.

APPENDIX D

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing trade misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 1803. Antitrust exemption

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided,* That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the At-

torney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

Pub.L. 91-353, § 4, July 24, 1970, 84 Stat. 467.

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-263

CHARLES GALBREATH,
Petitioner,

vs.

NEWSPAPER PRINTING CORP., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee

ALFRED H. KNIGHT
WILLIS & KNIGHT
215 Second Avenue, North
Nashville, Tennessee 37201
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee

STATEMENT OF THE CASE

The Petitioner brought this class action in the Chancery Court for Davidson County, Tennessee, alleging violations of his Constitutional rights to free expression and citing a provision of the Tennessee Constitution prohibiting monopolies. The complaint alleged that the Respondents had consistently refused to publish the Petitioner's abbreviated advertisements in their classified advertising sections, and alleged in general terms that this

refusal violated the Freedom of the Press provisions of the United States and Tennessee Constitutions, and the Anti-Monopoly provision of the Tennessee Constitution.

The Respondents filed a motion for summary judgment alleging: (1) that they are private unregulated businesses, and as such have a contractual right to accept or reject advertisements, and to impose conditions upon the content of advertisements they accept; (2) that they are exempted from the operation of the anti-trust laws by the provisions of the Newspaper Preservation Act (15 U.S.C. 1801, *et.seq*), except to the extent that they engage in practices that would violate the anti-trust laws if engaged in by a single newspaper, and that the refusal of abbreviated advertisements is not such a practice; and (3) that they have a right under the First Amendment to the United States Constitution to refuse to publish advertisements which they do not desire to publish, at least to the extent that such refusals do not violate anti-trust statutes or other specific prohibitions.

The Chancery Court sustained the motion, essentially agreeing with the above contentions. The Tennessee Court of Appeals reversed, holding that the "reasonableness" of the Respondents' policy of rejecting abbreviated advertisements presented a justiciable issue. The Tennessee Supreme Court reversed the Court of Appeals' decision and affirmed the trial court, holding that the Newspaper Preservation Act exempted the Respondents from anti-trust actions except to the extent their conduct would constitute a violation of anti-trust law if engaged in by a single entity; that a policy of refusing abbreviated advertisements as alleged in the complaint did not constitute such a violation; and that the Respondents had a Constitutional and common law right to reject abbreviated advertisements if they did not desire to print them.

QUESTIONS PRESENTED

1. Whether the Newspaper Preservation Act (15 U.S.C 1801, *et seq.*) requires that newspapers acting pursuant to qualifying joint operating agreements be treated as single entities for purposes of applying the anti-trust laws.

2. Whether a newspaper, acting as a single entity, is legally entitled to adopt a policy of rejecting abbreviations in its classified advertising sections, without having the "reasonableness" of its policy subjected to judicial review.

3. Whether a prospective advertiser has a First Amendment or other right to require a newspaper to accept abbreviated advertisements, on the ground that its policy of rejecting such advertisements is "unreasonable," and increases the cost of advertising.

ARGUMENT

The petition for writ of certiorari in this case should be denied because it raises no substantial Federal question.

1. Interpretation of the Newspaper Preservation Act.

Assuming that the complaint in this case can be construed as asserting a cause of action under Federal Anti-trust statutes,[1] the Tennessee Supreme Court was clearly correct in holding that the Newspaper Preservation Act (15 U.S.C. 1801, *et seq.*) provides an absolute anti-trust exemption for these Defendants, insofar as the facts of this case are concerned. In so holding, the Court simply followed the plain wording and intent of the Act.

The clearly expressed intent of the Act was to exempt newspapers acting pursuant to qualified joint operating agreements from anti-trust actions based upon conspiracy or joint action theories. The Act was passed in 1970 in response to the decision of this Court in *Citizens Publishing Company v. United States*, 394 U.S. 131 (1968), holding that joint price-setting pursuant to a joint operating agreement was a *per se* anti-trust violation. The Newspaper Preservation Act, in effect, reversed this holding as to newspapers then operating under joint operating agreements. The Act provides that "it shall not be unlawful under any anti-trust law for any person to perform . . . any joint newspaper operating arrangement entered into prior to July

[1] The trial court generously concluded that it could, although the complaint does not refer to Federal Anti-trust statutes, and it is at least doubtful that it factually alleges a Federal Anti-trust violation.

24, 1970 . . . ." Joint operating agreements are defined in the Act as:

> "Any contract . . . entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production of the facilities are established or operated and joint or unified acts are taken or agreed to be taken with respect to one or more of the following: printing, time, method and field of publication; allocation of production facilities; distribution; *advertising solicitation;* circulation solicitation; *business departments; establishment of advertising rates*; establishment of circulation rates and revenue distribution." (emphasis added).
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> 15 U.S.C. 1802(2).

While the above joint practices are exempted, practices that would violate the anti-trust laws if engaged in by a single entity are not exempted:

> "Nothing contained in the Chapter shall be construed to exempt from any anti-trust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any anti-trust law if engaged in by a single entity."
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> 15 U.S.C. 1803(c).

Thus, the Act plainly exempts jointly-operated newspapers from anti-trust actions which are based upon a joint action or conspiracy theory, but leaves them subject to liability for single entity violations. The meaning of the statute and its application to the present facts is plain, and raises no substantial Federal question.[2]

[2] The Act is unambiguous on its face and its interpretation does not appear to require reference to legislative history. The legislative history does, in any case, fully support the plain language of the stat-

2. **The Respondents, Considered as a Single Entity, Have a Common Law and Constitutional Right to Reject Abbreviated Advertising, Without Having the "Reasonableness" of This Policy Subjected to Judicial Review.**

Like other private businesses, newspapers are entitled to contract for their services and to impose conditions upon furnishing them, provided they do not violate any anti-trust or other statutory prohibitions. Newspapers are generally free to accept or reject advertisements and classes of advertisements according to their own business judgment. Such judgments are not reviewable by the courts in terms of reasonableness, any more than similar judgments by other business concerns are so reviewable. The holdings of this effect have been virtually unanimous.[3]

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ute. The Senate Judiciary Committee expressly adopted the following testimonial statement concerning the meaning and effect of the Act:

> "I am saying that they [joint operating newspapers] are considered as a merger. I am wiping out any violation for getting together to fix prices. I am trying to take Tuscon and put it in the position of Phoenix. In Phoenix one owner can set prices. There is nothing illegal about setting prices. If his prices are predatory or if his prices are designed to eliminate competition or monopolize the territory then he is open to challenge in either civil or criminal litigation. The same would apply to Tuscon under this bill."
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> Report of the Senate Judiciary Committee, 91st Cong., 1st Session, No. 91-535.

In what appears to be the only reported case involving a similar issue, the District Court for the Northern District of Indiana applied the Act precisely as it was applied by the Tennessee Supreme Court in the present case:

> "Considering the purpose of [The Newspaper Preservation Act], if a practice or conduct would be lawful if engaged in by a single newspaper entity, such conduct should not become unlawful by the mere fact that two newspapers are operating under a qualifying joint newspaper agreement."
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> *America's Best Cinema Corp. v. Ft. Wayne Newspapers, Inc.*, 347 F. Supp. 328, 334 (N.D. Ind. 1972).

[3] *Friendenberg v. Times Pub. Co. Ltd.*, 170 La. 3, 127 So. 345 (1930); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie New Yorker*, 205 Misc. 982, 131 N.Y.S.2d 515 (1954); *Levinson v. The Evening Star Newspaper Co.*, 118 F. Supp. 947 (D.C. 1955); *Gordon, Inc. v. Worcester Telegram Pub. Co.*, 343 Mass. 142, 177 N.E. 2d 586 (1961); *Staff Research Assoc., Inc. v. Tribune Co.*, 345 F. 2d 372 (7th Cir. 1965); *Bloff v. Federated Pub., Inc.*, 145 N.W.2d 800; *Cf. Sharon Held Co. v. Mercer Co.*, 132 Pa. Super. 245 (1930); *Fisher v. News Journal Co.*, 21 A.2d 685 (Del. 1942); *Louis Whahl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931); *Commonwealth v. Boston Transcript Co.*, 249 Mass. 477, 144 N.E. 400, 35 ALR 1 (1924); *Mark v. Costello*, 32 S. Dak. 511, 143 N.W. 950 (1913); and *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813, 87 ALR 975 (Iowa 1933). The single exception to these holdings appears to be "one [otherwise unidentified] case decided in 1919." See *Bloff v. Federated Pub., Inc.*, 145 N.W.2d 800 (1967).

Moreover, recent pronouncements by this Court indicate that Freedom of the Press includes the right not to publish, as well as the right to publish, and that newspapers have a First Amendment right to reject advertising which they do not wish to publish:

> "A newspaper is more than a passive receptacle or a conduit for news comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on size and content of the paper, and treatment of public issues and public officials—whether fair or unfair, constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."
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> *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258, 41 L.Ed.2d 730, 741 (1974).

3. An Individual Has No First Amendment or Other Right to Require a Newspaper to Accept Advertising Which Is Not Acceptable in Accordance With the Paper's Established Policies on the Ground That the Policy Is Allegedly "Unreasonable."

Taking the Petitioner's factual allegations as true, and giving them the very liberal interpretation adopted by the trial court, the Petitioner is asserting that he has a legal right to purchase from the Respondents a service which they do not offer—i.e., publication of abbreviated advertisements—because such advertisements would be less expensive, and because he considers the policy of rejecting such advertisements to be "unreasonable." These allegations do not state a cause of action under any known statute or principle of law, and indeed the Petitioner has not even described his purported cause of action in such terms. To the extent that the Petitioner relies upon cases such as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that reliance is clearly misplaced. These decisions establish that commercial expression is entitled to First Amendment protection, but do not in any way suggest that advertisers, therefore, have a First Amendment right to force their advertisements upon unwilling newspapers. Indeed, as previously noted, this Court has indicated that newspapers have a First Amendment right *not* to publish such advertisements. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). To the extent that the Petitioner has attempted to assert rights under the First Amendment to the United States Constitution, therefore, his petition plainly fails to raise a substantial Federal question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

WILLIS & KNIGHT

ALFRED H. KNIGHT
215 Second Avenue, North
Nashville, Tennessee 37201
Attorneys for Respondents

Certificate of Service

I hereby certify that a copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari has been mailed to Mr. Charles Galbreath this 31st day of August, 1979.

Alfred H. Knight